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Dato' Seri Anwar bin Ibrahim v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPLICATION NO 05–47–03 OF 2014(W)
ZULKEFLI CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASAN LAH, ABU SAMAH NORDIN AND ZAHARAH IBRAHIM FCJJ
14 DECEMBER 2016

C

Civil Procedure — Jurisdiction — Federal Court — Applicant who lost criminal appeal to Federal Court asked court to review decision — Rules of the Federal Court 1995 r 137 — Whether grounds raised by applicant fell within permitted circumstances under which Federal Court could exercise inherent powers of review under r 137

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The applicant applied under r 137 of the Rules of the Federal Court 1995 ('the RFC') to review its earlier decision which affirmed his conviction and sentence by the Court of Appeal ('COA') on a charge of sodomy, an offence under s 377B of the Penal Code. The applicant asked the Federal Court to set aside the COA's decision, or, alternatively, rehear his appeal against that decision. The High Court, which tried the case in the first instance, had acquitted and discharged the applicant of the offence, holding, inter alia, that it could not convict him solely on the uncorroborated evidence of the complainant, PW1, on the ingredient of penetration. An expert defence witness, DW1, who was the first doctor to examine PW1 following his lodging of a police report against the applicant, testified that PW1 had told him that a plastic object was inserted into his anus. Three other doctors called by the prosecution, ie PW2, PW3 and PW4, were, however, of the opinion that there was penile penetration of PW1's anus. They came to this conclusion after physically examining PW1 and collecting samples from him for analysis. The defence contended that the conclusions reached by PW2, PW3 and PW4 on the issue of penile penetration were wrong; that the samples taken from PW1 were not properly handled, and thus their integrity was compromised, and that it was unlikely any semen could have been extracted from PW1's anus 36 hours after the alleged incident which could conclusively point to the applicant being its contributor. In making his defence to the charge at the trial, the applicant elected to give a statement from the dock in which he alleged his trial was a political conspiracy. The COA allowed the prosecution's appeal against the trial court's decision, convicted the applicant on the charge and sentenced him to five years' jail holding, inter alia, that the trial court was wrong to have doubted the integrity of the samples collected from PW1. On 10 February 2015, the Federal Court dismissed both the applicant's appeal against the COA's decision and the prosecution's

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cross-appeal against sentence. The Federal Court upheld the findings of the COA and affirmed the conviction and sentence. In his instant application for review of that decision, the applicant contended that: (a) the 'swift and premature release' of a media statement from the Prime Minister's Office ('PMO') commenting on his conviction about 15 minutes after the Federal Court had pronounced the upholding of his conviction but before it had heard arguments on his sentencing, rendered the court's decision 'unsafe' as it gave the impression the PMO knew in advance of the result of the applicant's appeal and casted doubt on whether he had received a fair and independent hearing; (b) the decision was also rendered 'unsafe' by the conduct of the lead prosecutor in the appeal embarking upon a 'roadshow' following the conclusion of the appeal to explain the details of the case to the public. The applicant alleged the lead prosecutor had made 'vicious, vulgar and personal attacks' against him during the roadshow which was allegedly organised and facilitated by the ruling party, UMNO, again endorsing the contention that his trial was a political conspiracy. The applicant contended that the lead prosecutor's roadshow cast doubt on the fairness of his trial and showed that the prosecutor was biased and had not conducted the prosecution in the interests of justice; and (c) the trial court and the appellate courts had failed to properly consider all the evidence which led to there being procedural unfairness and a miscarriage of justice. With regard to this last ground, the applicant contended that: (i) the trial court wrongly took into account previous alleged instances when the applicant had sodomised PW1; that the Federal Court appeared to have acted on that evidence when deciding his appeal; (ii) the Federal Court wrongly found that there was no break in the chain of the custody of the exhibits and also wrongly dismissed as unimportant the prosecution's failure to explain how a carpet on which the alleged sodomy was committed had 'moved' to another unit in the apartment block; (iii) the Federal Court was wrong not to fault the prosecution for failing to call DW1 as its witness although his evidence could have favoured the applicant; and (iv) the trial court and the appellate courts failed to sufficiently consider his defence of political conspiracy.

Held, dismissing the application:

(1) There was no evidence to show there was any communication whatsoever between the Prime Minister's Office ('PMO') and the Federal Court either prior to or subsequent to the decision of the case. The affidavit in reply of Datuk Seri Tengku Sariffuddin bin Tengku Ahmad, a director of the media division at the PMO confirmed this fact. As to whether it was right or proper for the PMO to have issued a statement commenting on the applicant's conviction immediately after the court's decision on 10 February 2015, it was not within the control of the court to stop the issuance of such statement. The Judiciary and the courts operated independently in their decision-making process with no interference

from other branches of the government. There had to exist a clear separation of powers between the Judiciary and the other two arms of government in order to uphold the rule of law (see paras 58 & 60).

(2) The alleged misconduct, if any, of the lead prosecutor had no bearing on the outcome of the decision of the Federal Court in this case. There was no evidence furnished or averment of any sort by the applicant to suggest the lead prosecutor's alleged misconduct had influenced the decision of the Federal Court on 10 February 2015. As to the contention that the lead prosecutor was biased and had conducted the prosecution not in the interests of justice, it must be stated that the Attorney General ('AG') had earlier appointed a third-party to carry out the appeal process at the COA and the Federal Court due to the fact the AG's Chambers was claimed by the applicant to be biased towards the government and that it had practised selective prosecution in framing the charge against him. The lead prosecutor was duly appointed under ss 376(3) and 379 of the Criminal Procedure Code ('the CPC') read together with art 145(3) of the Federal Constitution to lead the prosecution at the hearing of the appeals. The Federal Court found the lead prosecutor to be a fit and proper person under s 376(3) of the CPC as no evidence was tendered by the applicant to prove that there was such a conflict of interest as alleged by him (see paras 61–63).

(3) In his police report, PW1 alleged that there were previous acts of sodomy upon him by the applicant which evidence the trial judge acted upon in writing his judgment. Notwithstanding the alleged injustice on the admission of such inadmissible evidence, the trial judge acquitted and discharged the applicant at the end of the trial. The applicant alleged the Federal Court appeared to have acted on this evidence in its judgment. We are not in a position to ascertain whether the Federal Court had, in fact, relied upon the alleged inadmissible evidence as it did not address this point at all and no reason was given on the issue of the admission or rejection of the alleged inadmissible evidence (see paras 66–70).

(4) The question of the KY Jelly raised by the applicant was a non-issue and it had not caused him any injustice. The Federal Court had held that there was no conclusive evidence that KY Jelly had in fact spilled on to the carpet and it took the view that the issues regarding the Jelly and about how the carpet had 'moved' from one apartment unit to another were not critical to the prosecution's case in the light of other compelling evidence. The issues relating to the misevaluation of the evidence, improper direction or non-direction by the Federal Court, if any, were not within the permitted circumstances for this court to exercise its inherent powers of review (see paras 72 & 74).

(5) Both the COA and the Federal Court gave due consideration to the applicant's allegations that there was a break in the chain of custody of the

exhibits and that the exhibits had been tampered with. The Federal Court in its judgment stated that it agreed with the COA that the integrity of the samples had not been compromised. The issues raised by the applicant related to questions of facts and findings made by the respective courts. There were reasons given by the courts for such findings. Therefore the issues raised were not within the permitted circumstances under which this court could exercise its inherent powers under r 137 of the RFC (see paras 76–78).

[Bahasa Malaysia summary

Pemohon telah memohon di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('KMP') untuk menyemak semua keputusan terdahulu yang mengesahkan sabitan dan hukumannya oleh Mahkamah Rayuan ('MR') atas pertuduhan liwat, satu kesalahan di bawah s 377B Kanun Keseksaan. Pemohon memohon Mahkamah Persekutuan untuk mengetepikan keputusan MR, atau, secara alternatif, mendengar semula rayuannya terhadap keputusan tersebut. Mahkamah Tinggi, yang telah mendengar kes itu pada mulanya, telah melepas dan membebaskan pemohon daripada kesalahan itu, dengan memutuskan, antara lain, bahawa ia tidak boleh mensabitkannya semata-mata atas keterangan yang tidak disokong tentang pengadu, PW1, berhubung elemen penetrasi. Seorang saksi pakar pembelaan, DW1, yang merupakan doktor pertama yang memeriksa PW1 berikutan dia membuat laporan polis terhadap pemohon, telah memberi keterangan bahawa PW1 memberitahunya bahawa objek plastik telah dimasukkan ke dalam duburnya. Tiga doktor lain yang dipanggil oleh pendakwaan, iaitu PW2, PW3 dan PW4, adalah, bagaimanapun, berpendapat bahawa terdapat penetrasi zakar di dubur PW1. Mereka tiba kepada kesimpulan ini selepas memeriksa PW1 secara fizikal dan mengumpul sampel-sampel darinya untuk dianalisis. Pembelaan menegaskan bahawa kesimpulan yang diperoleh oleh PW2, PW3 dan PW4 berhubung isu penetrasi zakar itu adalah salah; bahawa sampel-sampel yang diambil dari PW1 tidak dikendalikan sewajarnya, dan oleh itu integritinya diabaikan, dan bahawa adalah tidak mungkin mana-mana air mani boleh diperolehi dari dubur PW1 36 jam selepas kejadian dikatakan itu yang boleh disimpulkan menunjukkan pemohon sebagai penyumbangnya. Dalam membuat pembelaannya terhadap pertuduhan semasa perbicaraan, pemohon memilih untuk memberikan kenyataan daripada kandang di mana dia mengatakan perbicaraannya adalah satu konspirasi politik. MR telah membenarkan rayuan pendakwaan terhadap keputusan mahkamah perbicaraan, mensabitkan pemohon atas pertuduhan itu dan menghukumnya penjara lima tahun dengan memutuskan. Antara lain, bahawa mahkamah perbicaraan adalah salah kerana meragui integriti sampel-sampel yang dikumpul daripada PW1. Pada 10 Februari 2015, Mahkamah Persektuan telah menolak kedua-dua rayuan pemohon terhadap keputusan MR dan pendakwaan telah membuat rayuan balas terhadap hukuman itu. Mahkamah Persekutuan telah mengekalkan penemuan MR dan mengesahkan sabitan dan hukuman. Dalam

permohonannya untuk semakan semula keputusan tersebut, pemohon berhujah bahawa: (a) 'swift and premature release' kenyataan media dari Pejabat Perdana Menteri ('PPM') dengan membuat ulasan tentang sabitannya lebih kurang 15 minit selepas Mahkamah Persekutuan mengisytiharkan untuk mengekalkan sabitannya tetapi sebelum ia telah mendengar hujah-hujah berhubung penghukumannya, yang menyebabkan keputusan mahkamah 'unsafe' kerana ia memberi gambaran PPM mengetahui terlebih dahulu rayuan pemohon dan menimbulkan keraguan tentang sama ada dia telah menerima perbicaraan yang adil dan berasingan; (b) keputusan itu juga dianggap 'unsafe' melalui perlakuan ketua pendakwa raya dalam rayuan dengan memulakan 'roadshow' berikutan kesimpulan rayuan itu untuk menjelaskan butiran kes kepada pihak awam pemohon mengatakan ketua pendakwa raya telah membuat 'vicious, vulgar and personal attacks' terhadapnya sepanjang *roadshow* yang dikatakan telah dianjurkan dan dikendalikan oleh parti pemerintah, UMNO, sekali lagi menyokong hujah bahawa perbicaraanya adalah sati konspirasi politik. Pemohon berhujah bahawa *roadshow* ketua pendakwa raya menimbulkan keraguan tentang keadilan perbicaraannya dan menunjukkan bahawa pendakwaan berat sebelah dan tidak menjalankan pendakwaan demi kepentingan keadilan; dan (c) mahkamah perbicaraan dan mahkamah rayuan telah gagal mempertimbangkan sewajarnya semua keterangan yang membawa kepada ketidakadilan prosedur dan ketidakadilan yang tidak dilaksanakan. Berkenaan alasan terakhir ini, pemohon telah berhujah bahawa: (i) mahkamah perbicaraan telah salah dalam mengambil kira kejadian yang dikatakan terdahulu apabila PW1 diliwat; bahawa Mahkamah Persekutuan kelihatan telah bertindak berdasarkan keterangan tersebut apabila memutuskan rayuan beliau; (ii) Mahkamah Persekutuan telah salah kerana mendapati bahawa tiada lompang dalam rantaian pengawalan ekshibit-ekshibit itu dan juga telah salah kerana menolak sebagai tidak penting kegagalan pendakwaan untuk menjelaskan bagaimana permaidani di mana liwat itu dikatakan berlaku telah 'moved' kepada unit lain dalam blok apartmen itu; (iii) Mahkamah Persekutuan adalah salah kerana tidak menuduh pendakwaan telah gagal untuk memanggil DW1 sebagai saksinya meskipun keterangannya mungkin boleh menyebelahi pemohon; dan (iv) mahkamah perbicaraan dan mahkamah rayuan telah gagal untuk mengambil kira sewajarnya pembelaannya untuk konspirasi politik.

Diputuskan, menolak permohonan:

(1) Tiada keterangan untuk menunjukkan terdapat apa-apa hubungan antara Pejabat Perdana Menteri ('PPM') dan Mahkamah Persekutuan sama ada sebelun atau selepas keputusan kes itu. Afidavit jawapan Datuk Seri Tengku Sariffuddin bin Tengku Ahmad, pengarah bahagian media di PPM telah mengesahkan fakta ini. Berhubung sama ada ia adalah betul atau wajar untuk PPM mengeluarkan kenyataan mengulas tentang sabitan pemohon sejurus selepas keputusan mahkamah pada 10 Februari

2015, ia bukan dalam kawalan mahkamah untuk menghentikan pengeluaran kenyataan sedemikian. Badan Kehakiman dan mahkamah beroperasi secara berasingan dalam proses membuat keputusan mereka tanpa campur tangan daripada mana-mana cabang kerajaan. Perlu ada pengasingan kuasa yang jelas antara Badan Kehakiman dan dua cabang kerajaan yang lain bagi tujuan mengekalkan rukun undang-undang (lihat perenggan 58 & 60).

(2) Salah laku yang dikatakan itu, jika ada, tentang ketua pendakwa raya tiada kaitan dalam hasil keputusan Mahkamah Persekutuan dalam kes ini. Tiada keterangan dikemukakan atau apa jenis penegasan oleh pemohon untuk mencadangkan salah laku ketua pendakwa raya yang dikatakan itu telah mempengaruhi keputusan Mahkamah Persekutuan pada 10 Februari 205. Berhubung hujah bahawa ketua pendakwa raya berat sebelah dan telah menjalankan pendakwaan tanpa mengira kepentingan keadilan, ia perlu dinyatakan bahawa Peguam Negara terlebih dahulu telah melantik pihak ketiga untuk menjalankan proses rayuan di Mahkamah Rayuan dan Mahkamah Persekutuan berdasarkan fakta yang Jabatan Peguam Negara didakwa oleh pemohn sebagai berat sebelah terhadap kerajaan dan bahawa ia telah mengamalkan pendakwaan selektif dalam membuat pertuduhan terhadapnya. Ketua pendakwa raya itu telahpun dilantik di bawah ss 376(3) dan 379 Kanun Tatacara Jenayah ('KTJ') dibaca bersama perkara 145(3) Perlembagaan Persekutuan bagi mengetuai pendakwaan semasa perbicaraan rayuan-rayuan itu. Mahkamah Persekutuan mendapati ketua pendakwa raya seorang yang layak dan sesuai di bawah s 376(3) KTJ kerana tiada keterangan telah ditenderkan oleh pemohon untuk membuktikan bahawa terdapat konflik kepentingan sepertimana dikatakan olehnya (lihat perenggan 61–63).

(3) Dalam laporan polisnya, PW1 telah mengatakan bahawa terdapat perbuatan liwat yang terdahulu ke atasnya oleh pemohon di mana keterangan hakim perbicaraan telah bertindak ke atasnya dalam penulisan penghakiman beliau. Walau apa pun ketidakadilan yang dikatakan tentang kemasukan keterangan yang tidak boleh diterima, hakim perbicaraan telah melepas dan membebaskan pemohon di akhir perbicaraan itu. Pemohon telah mengatakan Mahkamah Persekutuan dilihat telah bertindak berdasarkan keterangan ini dalam penghakimannya. Mahkamah ini bukan dalam kedudukan untuk menentukan sama ada Mahkamah Persekutuan telah, bahkan, bergantung kepada keterangan yang dikatakan tidak boleh diterima kerana ia tidak mengutarakan perkara ini langsung dan tiada sebab berhubung isu penerimaan atau penolakan keterangan yang dikatakan tidak boleh diterima itu (lihat perenggan 66–70).

(4) Persoalan berhubung KY Jelly yang ditimbulkan oleh pemohon bukan

suatu isu dan ia tidak menyebabkan ketiadakadilan terhadapnya. Mahkamah Persekutuan telah memutuskan bahawa tidak terdapat apa-apa keterangan konklusif bahawa KY Jelly telah tertumpah ke atas permaidani itu dan ia berpendapat bahawa isu-isu berkenaan Jelly itu dan tentang bagaimana permaidani itu 'moved' dari satu unit apartmen ke satu yang lain tidak kritikal kepada kes pendakwaan berdasarkan keterangan nyata yang lain. Isu-isu berkaitan salah penilaian keterangan, arahan tidak wajar atau tiada arahan oleh Mahkamah Persekutuan, jika ada, tidak dalam keadaan yang dibenarkan bagi mahkamah ini menggunakan kuasa tersedia padanya berhubung semakan semula (lihat perenggan 72 & 74).

(5) Kedua-dua Mahkamah Rayuan dan Mahkamah Persekutuan telah memberi pertimbangan wajar terhadap dakwaan pemohon bahawa terdapat lompang dalam rantaian kawalan ekshibit-ekshibit dan bahawa ekshibit-ekshibit itu telah diusik. Mahkamah Persekutuan dalam penghakimannya menyatakan bahawa ia bersetuju dengan Mahkamah Rayuan yang integriti sampel-sampel itu tidak terjejas. Isu-isu yang ditimbulkan oleh pemohon berkaitan persoalan fakta dan penemuan yang dibuat oleh mahkamah masing-masing. Terdapat sebab yang diberikan oleh mahkamah untuk penemuan sedemikian. Oleh itu isu-isu yang ditimbulkan bukan dalam keadaan yang dibenarkan di mana mahkamah boleh menggunakan kuasa tersedia padanya di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan (lihat perenggan 76–78).]

Notes

For cases on Federal Court, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5719–5739.

Cases referred to

AR Antulay v RS Nayak & Anr (1988) 2 SCC 602, SC (refd)

Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] MLJU 1090; [2008] 6 CLJ 1, FC (folld)

Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corpn [1981] 1 All ER 289, HL (refd)

Cassell & Co Ltd v Broome and another (No 2) [1972] 2 All ER 849, HL (refd)

Chia Yan Tek & Anor v Ng Swee Kiat & Anor [2001] 4 MLJ 1; [2001] 4 AMR 3921, FC (refd)

Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications [2013] 4 MLJ 351, FC (refd)

Dato' Seri Anwar bin Ibrahim v PP [2016] 3 MLJ 277; [2016] 4 AMR 213, FC (refd)

Gurbachan Singh s/o Bagawan Singh & Anor v Vellasamy s/o Pennusamy & Ors and other applications [2012] 2 MLJ 149; [2012] 2 CLJ 663, FC (refd)

Ng Ka Ling & Ors v Director of Immigration [1999] 1 HKC 291; [1999] HKCFA 72 (refd)
Rupa Ashok Hurra v Ashok Hurra (2002) 4 SCC 388, SC (refd)
Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim [2008] 3 MLJ 753; [2008] 4 AMR 583, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 16, 16(a), 17
Criminal Procedure Code ss 376(3), 379, 402A
Evidence Act 1950 ss 14, 15, 114(g)
Federal Constitution arts 128, 128(3), 145(3)
Indian Supreme Court Rules 1966 O XLVII r 6
Penal Code s 377B
Rules of the Federal Court 1995 r 137

Gopal Sri Ram (Sivarasa Rasiah, Leela Jesuthasan, N Surendran, CK Lim, Latheefa Koya, Sangeet Kaur Deo d/o Karpal Singh, Eric Paulsen, Melissa Sasidaran, Shahid Adli bin Kamarudin, David Yee Hii Kiet and Lee Bhaskaran with him) (Daim & Gamany) for the applicant.
Ahmad Kamal bin Md Shahid (Awang Armadajaya bin Awang Mahmud, Wan Shaharuddin bin Wan Ladin, Tengku Amir Zaki bin Tengku Abdul Rahman dan Zhafran Rahim Hamzah) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zulkefli CJ (Malaya) (delivering judgment of the court):

INTRODUCTION

[1] This is a review application by the applicant, Dato' Seri Anwar bin Ibrahim for the following orders:

(a) that the order of the Federal Court dated 10 February 2015 be set aside under r 137 of the Rules of the Federal Court 1995 ('the RFC') and/or pursuant to the inherent jurisdiction of the court;

(b) that the orders of conviction and sentence passed by the Court of Appeal on 7 April 2014 be set aside;

(c) alternatively, that his appeal in the Federal Court be re-heard on its merits; and

(d) that such further order or direction be made or given as this court deems fit.

[2] The grounds relied on by the applicant for his review application can be summarised as follows:

(a) that the judgment ought to be reviewed because of the swift and premature release of the Prime Minister's Office's statement on the date of this court's judgment dated 10 February 2015. This is an act on the part of the Executive arm of the government that had rendered the decision of the Federal Court unsafe;

(b) that the conduct of counsel leading the prosecution after the date of this court's judgment renders the said judgment objectively unsafe; and

(c) that the order of the Court of Appeal dated 7 March 2014 should be set aside to prevent injustice. The applicant alleged there had been a misevaluation of evidence, improper direction, non-direction or misdirection of the evidence by the trial court and the two appellate courts which had occasioned a procedural unfairness and thus a miscarriage of justice.

THE CHARGE

[3] The applicant was charged at the instance of the public prosecutor for committing an offence under s 377B of the Penal Code as follows:

> Bahawa kamu, pada 26 Jun 2008 antara jam 3.01 petang dan 4.30 petang di alamat Unit 11-5-1, Desa Damansara Condominium, No. 99 Jalan Setiakasih, Bukit Damansara, Kuala Lumpur dalam Wilayah Persekutuan Kuala Lumpur, telah dengan sengaja melakukan persetubuhan yang bertentangan dengan aturan tabii dengan Mohd Saiful Bukhari bin Azlan dengan memasukkan zakar kamu ke dalam duburnya; dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 377B Kanun Keseksaan.
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> English Translation:
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> That you, on 26 June 2008 between 3.01 p.m. to 4.30 p.m. at Unit 11-5-1, Desa Damansara Condominium, No. 99, Jalan Setiakasih, Bukit Damansara, Kuala Lumpur in the Federal Territory of Kuala Lumpur, did intentionally commit carnal intercourse against the order of nature with Mohd Saiful Bukhari bin Azlan by inserting your penis into his anus; and thereby have committed an offence punishable under section 377B of the Penal Code.

THE CASE FOR THE PROSECUTION

[4] The relevant facts of the prosecution's case are these. The applicant as the accused person was charged under s 377B of the Penal Code for committing carnal intercourse against the order of nature on the complainant, Mohd Saiful Bhukhari bin Azlan. The evidence adduced by the prosecution showed that PW1, the complainant was the accused person's personal assistant since March 2008. By way of evidence given in camera PW1 described in detail how on 26 June 2008 his anus was penetrated by the accused person's penis with the aid of lubricant known as 'KY Jelly'. PW1 said that ejaculation occurred in his anus. On 28 June 2008, PW1 was examined by three doctors,

namely Dr Mohd Razali Ibrahim ('PW2'), Dr Siew Sheue Feng ('PW3') and Dr Khairul Nizam bin Hassan ('PW4'). During such examinations, specimens were taken from PW1. PW2 testified that he was of the opinion there was penile penetration. PW3 also concluded that there was anal penetration and it was consistent with 'penile penetration'. PW4 also gave the same conclusion as that of PW3.

[5] At the end of the prosecution's case, the trial judge ruled that the prosecution has established a prima facie case and ordered the applicant to enter on his defence.

THE CASE FOR THE DEFENCE

[6] The applicant elected to give statement from the dock. The applicant had earlier given a notice of alibi pursuant to s 402A of the Criminal Procedure Code and listed 13 witnesses in support of his alibi. However, the defence of alibi was abandoned. When he was called to enter on his defence, the accused called six witnesses. The applicant claimed in his statement that he was deprived of a fair trial. The applicant alleged that the entire process was a conspiracy by the Prime Minister to send him into political oblivion.

[7] The defence expert witness DW3 commented that there were serious shortcomings in the handling of DNA sample ('D28') by PW3. DW3 further testified that it was wrong for PW2, PW3 and PW4 to conclude that there was 'anal penile penetration' based on another person's opinion. DW3 and another defence expert witness DW4 complained that there was no photographic evidence by PW5 indicating that the sperm were actually seen in the swabs. DW3 and DW4 said that the prosecution evidence pertaining to the finding of male Y's semen in the complainant's anus was doubtful because it was unlikely any semen could be retrieved beyond 36 hours after a sexual act. What more in this case the samples were not properly handled.

DECISION OF THE HIGH COURT

[8] At the conclusion of the trial, the learned High Court judge found that the prosecution had failed to prove its case beyond reasonable doubt and the applicant as the accused person had succeeded in raising a reasonable doubt on the prosecution's case. In his grounds of judgment, the High Court judge, inter alia, held as follows:

> This court was left only with the evidence of PW1 to prove penetration. This being a sexual offence, it is trite law that the court is always reluctant to convict an accused person based solely on the uncorroborated evidence of the complainant. Therefore the accused is acquitted and discharged from the charge.

PROCEEDINGS IN THE COURT OF APPEAL

[9] Aggrieved with the decision of the High Court, the prosecution appealed to the Court of Appeal. On appeal, the Court of Appeal considered seven issues including the credibility of PW1, corroboration, integrity and chain of evidence in relation to the exhibits, degradation of samples, statement from the dock, alibi and opposing expert testimonies.

[10] After having heard the parties, the Court of Appeal allowed the appeal. The applicant was convicted and sentenced to five years imprisonment. The Court of Appeal in its judgment, inter alia, held as follows:

> In our considered view, the learned trial judge fell into serious error when he doubted the integrity of the samples based on the evidence of the two expert witnesses called by the defence.
>
> The finding of the learned trial judge is seriously flawed and merits our intervention. In our view, the reception by the learned trial judge of the defence expert witnesses' evidence is not objective and is one sided. This is a serious error ...
>
> For the aforesaid reasons, we allowed the appeal by the prosecution and set aside the decision of the learned judge. We find the respondent guilty as charged. Accordingly, we convicted him of the offence.

PROCEEDINGS IN THE FEDERAL COURT

[11] Aggrieved with the decision of the Court of Appeal, the applicant appealed to the Federal Court. The prosecution filed a cross-appeal on inadequacy of sentence. After having heard the parties, the Federal Court dismissed both the appeal and cross-appeal. The conviction by the Court of Appeal and the sentence meted out by the Court of Appeal on the applicant was affirmed. The Federal Court in its judgment amongst other things made its findings on the main issues raised by the defence as set out below.

[12] On the issue of the carpet (exh P49A) the Federal Court agreed with the contention of the defence that there was no evidence led as to how P49A 'moved' from apartment Unit 11–5–1 to Unit 11–5–2. P49A was sent to the chemist for analysis but no trace of KY Jelly was found on it. The Federal Court however held that there was no conclusive evidence that the KY Jelly had in fact spilled onto P49A. What PW1 said in his testimony was that the KY Jelly could have spilled on either P49A or the towel. In any event, the Federal Court took the view that P49A was not a critical piece of evidence to the prosecution's case in light of other compelling evidence.

[13] On the defence contention of the break in the chain of custody of the exhibits, the evidence shows that PW25, after receiving the sample bag (exh P27), had cut it open to add his own markings to the samples inside. He

was merely adhering to departmental guidelines and the Inspector-General Standing Orders ('IGSO') which required him as an investigating officer to put proper markings and labelling to the exhibits for the purpose of identification in courts. Having seen the physical evidence, especially the bottom part of P27 that was snipped by PW25, the Federal Court observed that PW25 was extremely careful in handling it. PW25 even left the snipped portion of P27 attached to it to show transparency in his action. PW25 then sent the samples to PW5 who thereafter developed the male Y DNA profile.

[14] PW5 in her testimony confirmed that she did not detect any tampering of the seals of the exhibits marked B to B10. The Federal Court therefore found that there was no break in the chain of custody of those exhibits. As such, the Federal Court agreed with the Court of Appeal that the integrity of the samples was not compromised. The Federal Court went on to state that the fanciful suggestion of the defence counsel that the DNA evidence had been planted was therefore unsustainable.

[15] On the defence of political conspiracy the Federal Court noted that the complaint was that the High Court and the Court of Appeal did not consider the political conspiracy defence which if accepted or believed would entitle the accused to an acquittal. On this issue the Federal Court accepted the fact that the courts below did not explicitly consider the political conspiracy defence which was raised by the accused in his unsworn statement from the dock. In law, a trial judge will not give much weight to what an accused has said in his unsworn statement as he is not subject to cross-examination by the prosecution nor can he be questioned by the trial judge. The Federal Court held on this issue that the Court of Appeal had adopted the right principle in assessing the applicant's statement from the dock and the defence of political conspiracy remained a mere allegation and unsubstantiated by any credible evidence.

[16] On the issue of DW1, who was not called as a witness by the prosecution, the Federal Court noted that DW1 was the doctor from PUSRAWI who first examined PW1. It was the defence's contention that DW1 should have been called by the prosecution as a witness in order to unfold the narrative of its case. This is especially so when DW1 in his evidence said that PW1 had told him that he had been assaulted by the insertion of a plastic object into his anus. On this issue the Federal Court held that it is trite that the discretion to call any witness lies with the prosecution and the court will not interfere with the exercise of that discretion. The non-calling of DW1 by the prosecution did not create any gap in its case as it had been fully narrated through the evidence of PW1 and corroborated by the three doctors (PW2, PW3 and PW4) and the chemists (PW5 and PW6). As such the Federal Court held that the question of drawing an adverse inference against the prosecution under s 114(g) of the Evidence Act 1950 did not arise.

A SUBMISSION OF THE APPLICANT

[17] In support of the applicant's application for a review of the applicant's case learned counsel for the applicant referred to us the provision of O XLVII r 6 of the Indian Supreme Court Rules 1966 which he contended is in pari materia with our r 137 of the RFC which provides as follows:

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> 6 Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

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[18] Learned Counsel referred to us the case of *Rupa Ashok Hurra v Ashok Hurra* (2002) 4 SCC 388 as the authority for the above application of the provision of the law wherein the Indian Supreme Court at p 420, inter alia, held:

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> Adverting to the true purport of the maxim, therefore, it is not gainsaid that the same relates to and arises from the concept of justice: in the event there appears to be infraction of the concept, question of there being a turnaround and thereby maintaining a total silence by the law courts would not arise. It is on this score, the learned Attorney-General for India, appealing as amicus curiae, contended that the
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> Supreme Court has the jurisdiction to exercise this inherent power for the ends of justice or to prevent abuse of the process of the court. Though we are not inclined to ascribe an order of this Court as an abuse of the process of the court, but the factum of the availability of inherent power for the ends of justice cannot in any way be decried. The Constitution of India assigned a pivotal role on to the Supreme
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> Court providing therein the supremacy of law with the rationale being justice is above all. The exercise of inherent power of this Court also stands recognized by Order XLVII Rule 6 of the Supreme Court Rules, 1966.

[19] It was further submitted for the applicant that this court can exercise its

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inherent power in the event of there being an error brought to the notice of this court. On this point Mukharji J (as he then was) in para 40 of the judgment in *AR Antulay v RS Nayak & Anr* (1988) 2 SCC 602 had this to say:

> 40. The question of validity, however, is important in that the want of jurisdiction can be established solely by a superior court and that, in practice, no decision can be
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> impeached collaterally by any inferior court. But the superior court can always correct its own error brought to its notice either by way of petition or ex debito justitiae. See *Rubinstein's Jurisdiction and Illegality*.

[20] Learned counsel for the applicant also referred to us the local case of

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Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] MLJU 1090; [2008] 6 CLJ 1 on the application of r 137 of the RFC. This court in that case recognised that the categories of instances where the court should exercise its inherent jurisdiction are not closed. At p 16, the Federal Court held that:

> [41] These are but just instances where the court has exercised its discretion to invoke r 137. There may be many other instances where r 137 may apply as can be seen from Civil Procedure books where High Courts exercise their inherent jurisdiction to prevent injustice or abuse of the process of the court. By the very meaning of 'inherent', as discussed earlier, it is not wise to even attempt to list out the other instances where this court should exercise such discretion. It is best to leave the question open and decide the applications as they come before this court. Inherent jurisdiction is not something conferred by the statute but which it has by its very nature of being a court to enable it to do justice and prevent injustice.

[21] On the first ground of complaint, based on the press statement of the Prime Minister's Office, it was argued for the applicant that on 10 February 2015, learned Chief Justice of the Federal Court, the presiding judge of the five member panel of the Federal Court, read out the judgment of the court which ended in the pronouncement of the conviction of the applicant at about 12.30pm. The court adjourned for an hour in order to hear arguments on sentence. About fifteen minutes after the court adjourned and before the arguments on sentence were heard, the Prime Minister's Office issued a statement commenting on the applicant's conviction and urging all persons to accept the decision. The said statement amongst others stated as follows:

> The Judges will have reached their verdict only after considering all the evidence in a balanced and objective manner.

[22] The applicant took the view that the extraordinary swiftness and timing of the statement and its contents thus gave the impression to the public that the Prime Minister's Office knew beforehand the result of the applicant's case and that the Prime Minister's Office statement further showed that the applicant did not receive a fair and independent hearing.

[23] On the second ground of complaint, based on the conduct of counsel leading the prosecution, it was contended for the applicant that subsequent to the applicant's conviction, Tan Sri Muhammad Shafee Abdullah, the said leading counsel, embarked upon a speaking roadshow to explain the 'Sodomy II Case', by which term this case was referred to by learned counsel. The applicant alleged that during the roadshow, Tan Sri Muhammad Shafee Abdullah gave vent to vicious, vulgar and personal attacks upon the applicant as the accused person in the case. It was further alleged that the roadshow was organised and facilitated, supported and endorsed by the political party UMNO. It has been the applicant's case throughout that this political conspiracy involved none other than the Prime Minister who had met with the complainant (PW1) two days before the alleged incident. To the applicant this conduct of the prosecutor had tainted the fairness of the applicant's trial. It further showed that the prosecutor was biased and conducted the prosecution not in the interest of justice.

[24] On the third ground relied on by the applicant it was submitted that there had been a breach of the rules of natural justice in the conduct of the trial against him. The learned trial judge in this case had ruled as inadmissible evidence alluding to alleged previous occasions on which acts of sodomy had been committed. The applicant was therefore entitled as a matter of natural justice not to have such evidence used against him. But when he came to write his judgment, the learned trial judge acted on this very evidence. This is a serious violation of the rules of natural justice which has occasioned a miscarriage of justice. Learned counsel for the applicant submitted on this point that the Court of Appeal and the Federal Court should have acted to correct this serious injustice but they did not do so. The respondent has therefore benefited from this departure of such an important rule which constituted an abuse of process.

[25] Still on the issue of injustice effected on the applicant it was submitted that the integrity of the scene of the alleged crime is of primary importance and this was compromised by the prosecution. According to the complainant PW1 the alleged act of sodomy was committed on a carpet in unit apartment 11–5–1. There was no evidence led as to how the carpet (P49A) moved from unit apartment 11–5–1 to unit 11–5–2. This staggering failure by the prosecution was dismissed in the judgment of the Federal Court as being not a critical piece of evidence to the prosecution's case. The Federal Court thus failed to deal with this crucial issue and to make obvious inferences from it.

[26] It is the applicant's contention that the Federal Court was wrong in finding that it is alright for the prosecution not to call a witness DW1, the doctor from PUSRAWI who examined PW1 and who clearly was in a position to give evidence favourable to the applicant as the accused person.

[27] It was also submitted for the applicant that the evidence of DW6, who testified that PW1 hated the accused person, was not even considered by the Federal Court.

[28] On exh P15 which was the underwear worn by PW1 on the day he was allegedly sodomised, the applicant contended that it had been washed by the mother of PW1's fiancée. This was not addressed and completely overlooked by the Federal Court.

[29] Exhibit P14 it was the underwear worn by PW1 on the day he lodged the police report. However, the defence contended that P14 was not the underwear worn by PW1 during the alleged incident. However, the chemist ('PW5') found semen stains on P14 rendering PW1's evidence totally unreliable. This was completely overlooked by the Federal Court, Court of Appeal and High Court.

[30] It was also submitted for the applicant that the Federal Court, Court of Appeal and High Court did not deal with the evidence of political conspiracy raised by the applicant in his defence.

[31] The applicant further challenged the evidence of PW25. PW25 had cut open the sample bag P27 allegedly to add his own markings to the sample inside. On this point the Federal Court found that there was no break in the chain of the custody of exhibits and went to suggest that the accused person's counsel was being 'fanciful'.

SUBMISSION OF THE RESPONDENT

[32] The respondent opposed the applicant's review application. Learned senior federal counsel for the respondent submitted that the applicant has failed to bring his complaint within any of the very limited circumstances under which the review powers under r 137 of the RFC can be exercised. The principle of law under r 137 of the RFC as laid down in earlier decided case authorities were referred to us and learned senior federal counsel impressed upon us that we should be guided by these case authorities in considering whether there is merit in the applicant's application (see the cases of (1) *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] MLJU 1090; [2008] 6 CLJ 1; (2) *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; [2001] 4 AMR 3921; (3) *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 4 AMR 583; (4) *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications* [2013] 4 MLJ 351).

[33] As regards the Indian provision of O XLVII r 6 of the Supreme Court Rules 1966 relied on by the applicant to show that it is the equivalent provision of our r 137 of the RFC, learned senior federal counsel for the respondent replied that the Indian provision is not in pari materia with our r 137 of the RFC and for that reason the Indian provision has been applied more liberally than our r 137 of the RFC in a review application.

[34] On the first ground of complaint of the applicant learned senior federal counsel referred to us the affidavit in reply of Datuk Seri Tengku Sariffuddin bin Tengku Ahmad, a Director of the Media Division at Prime Minister's Department who explained as follows:

(a) there is no communication whatsoever between Prime Minister's Office ('PMO') and the Federal Court either prior or subsequent to the decision of the case;

(b) in cases of public interest, it is a normal practice for PMO to issue an immediate response by way of a media statement on the matter; and

(c) it is a normal practice for PMO to prepare two separate media statements because the decision has to be either one of the probabilities that is, acquittal or conviction.

[35] On this issue of the PMO statement it is the submission of the respondent that the Federal Court is totally independent of any other body in its decision making process. The PMO has no say whatsoever on the outcome of the decision. All the insinuations and innuendos that the PMO knows the decision beforehand are wrong, baseless and irresponsible and should be wholly rejected.

[36] On the second ground raised by the applicant the respondent contended that the conduct of the lead prosecutor, Tan Sri Muhammad Shafee bin Abdullah, had no bearing on the outcome of the decision. There had been no averment of any sort to suggest that this alleged misconduct of the lead prosecutor had influenced the decision of the Federal Court.

[37] On the third ground of complaint of the applicant learned senior federal counsel for the respondent submitted that the issue of alleged misevaluation of evidence, improper direction, non-direction or misdirection of the trial court and the appellate court are not within the permitted circumstances that this court could exercise its review powers under r 137 of the RFC.

DECISION OF THIS COURT

The hierarchy of the court system

[38] At the outset it would be appropriate for us to highlight the hierarchy of the court system and the jurisdiction of the respective courts in the administration of our criminal justice in dealing with the applicant's present review application.

[39] As regards the jurisdiction of the Federal Court, art 128 of the Federal Constitution provides as follows:

> 128(1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction —
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> (a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and

(b) dispute on any other question between States or between the Federation and any State.

(2) Without prejudice to any appellate jurisdiction of the Federal Court, where in any proceedings before another court a question arises as to the effect of any provision of this Constitution, the Federal Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.

(3) The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law.

[40] It must be noted that art 128 of the Federal Constitution does not provide this court with the jurisdiction to deal with any review application as in the present case. Article 128(3) of the Federal Constitution only provides the Federal Court with the jurisdiction to determine appeals from the Court of Appeal, a High Court or a judge thereof as provided by federal law.

[41] As regards the jurisdiction of the Federal Court as provided by federal law the relevant legislation to look into is the Courts of Judicature Act 1964 ('the CJA'). Again, it must be noted that there is no specific provision in the CJA which grants jurisdiction to the Federal Court to hear application for a review of its own decision. The present review application is filed by the applicant under r 137 of the RFC and the said r 137 is made by the Rules Committee pursuant to delegated powers under ss 16 and 17 of the CJA.

Purpose and scope of r 137 of the RFC

[42] We may ask ourselves the question as to what is the purpose and scope of r 137 of the RFC.

[43] Section 16(a) of the CJA under which r 137 is made sets out one of the areas where the Rules Committee may make rules of court as follows:

16 Rules of court

Rules of court may be made for the following purposes:

(a) for regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the High Court, [the Court of Appeal and the Federal Court] in all causes and matters whatsoever in or with respect to which those Courts have for the time being jurisdiction (including the procedure and practice to be followed in the registries of those Courts), and any matters incidental to or relating to any such procedure or practice, including (but without prejudice to the generality of the foregoing provision) the manner in which, and the time within which, any applications which are to be made to a High Court [to the Court of Appeal or to the Federal Court] shall be made.

[44] It is to be noted that under s 16(a) of the CJA the rule making power is only in respect to which those courts have jurisdiction for the time being. It is not intended to confer jurisdiction as provided for under art 128 of the Federal Constitution. The Federal Court derives its judicial function from federal laws and although the RFC are federal laws, they are not intended to confer any new jurisdiction and do not in fact do so.

[45] From the wordings of s 16(a) of the CJA, it is clear that what is delegated to the Rules Committee is only the power to make rules relating to practice and procedure, and not to create substantive rights and duties.

[46] Rule 137 of the RFC provides as follows:

> For the *removal of doubts* it is hereby declared that nothing in these Rules shall be deemed to limit or affect the *inherent power* of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court. (Emphasis added.)

[47] We are of the considered view that the scope and application of r 137 of the RFC is well settled. Rule 137 is merely a restatement of the fact that this Court has an inherent power to prevent injustice or to prevent an abuse of the process of the court and that nothing in the RFC limits or affects that power. It does not confer upon the Federal Court a statutory jurisdiction or a new jurisdiction to hear any application to review its own decision. It does not provide for a means of an appeal to the Federal Court against its own decision (*Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] MLJU 1090; [2008] 6 CLJ 1; *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 4 AMR 583; *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2016] 3 MLJ 277; [2016] 4 AMR 213).

Inherent power or inherent jurisdiction

[48] The question that may be posed is whether this court can invoke its inherent power or inherent jurisdiction to rehear and re-evaluate the applicant's case that had been disposed of by the earlier panel of the Federal Court which heard the case on merits in the appeal proper from the decision of the Court of Appeal.

[49] The *Halsbury Laws of England* (4th Ed) in Vol 37 at para 12 refers to 'inherent jurisdiction' as follows:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or

equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[50] In *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corpn* [1981] 1 All ER 289 at p 295 Lord Diplock speaking on the subject of dismissing a pending action for want of prosecution and in relation to the issue of inherent power or inherent jurisdiction said:

> The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an 'inherent power' the exercise of which is within the 'inherent jurisdiction' of the High Court. It would I think be conducive to legal clarity if the use of these two expressions were confined to the doing by the court of acts which it needs *must have power to do in order to maintain its character as a court of justice.* (Emphasis added.)

[51] In the Hong Kong case of *Ng Ka Ling & Ors v Director of Immigration* [1999] 1 HKC 291; [1999] HKCFA 72 the Hong Kong Final Court of Appeal merely exercised its inherent jurisdiction upon an application by the Director of Immigration to clarify the court's earlier judgment. It was not to seek review of the earlier judgment.

[52] We took note of the submission of learned senior federal counsel for the respondent that in India the application for a review under O XLVII r 6 of the Supreme Court Rules 1966 is much more liberal when compared with the application for review under our r 137 of the RFC. It was impressed upon us that the said review provision in India is not pari materia with our r 137 of the RFC in view of the fact that in our r 137 of the RFC there contained the key opening words of 'For the removal of doubts', whereas there are no such words under the Indian provision. With respect we could not agree with the contention of learned senior federal counsel on this point.

[53] It is our considered view that both our r 137 of the RFC and the Indian provision under O XLVII r 6 of the Supreme Court Rules 1966 are meant for the courts to exercise their inherent jurisdiction to prevent injustice or abuse of the process of the court. There is no doubt that this court as a court of law is clothed with the inherent jurisdiction to entertain and hear the applicant's present application to review his case. Whether the applicant would succeed in his application would depend on the circumstances of the case. Although this court has the discretion to order a review of its own decision to prevent injustice or abuse of process that discretion will not be used liberally but only sparingly, in exceptional cases where substantial injustice had probably occurred and there was no alternative effective remedy. It is still open to the court to

determine such application on a case by case basis. On this point we agree with the view expressed by His Lordship Zaki Tun Azmi (PCA as he then was) in the case of *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] MLJU 1090; [2008] 6 CLJ 1 at p 15 as follows:

> The Court must exercise strong control over such application. It must be satisfied that it is within exceptional category.

[54] As regards some of the circumstances under which the inherent powers of the court should be exercised or not we would adopt the categories as listed and the principle as laid down in the case of *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* as follows:

(a) That there was a lack of quorum eg the court was not duly constituted as two of the three presiding judges had retired. (*Chia Yau Tek & Anor v Ng Swee Kiat & Anor.* [2001] 4 CLJ 61.

(b) The applicant had been denied the right to have his appeal heard on merits by the appellate court. (*Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645).

(c) *Where the decision had been obtained by fraud or suppression of material evidence. (MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577).

(d) Where the court making the decision was not properly constituted, was illegal or was lacking jurisdiction, but the lack of jurisdiction is not confined to the standing of the quorum that rendered the impugned decision. (*Allied Captal Sdn Bhd v Mohd Latiff bin Shah Mohd and another application* [2004] 4 CLJ 350).

(e) Clear infringement of the law (*Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2005] 1 CLJ 565).

(f) It does not apply where the findings of this court is questioned, whether in law or on the facts (since these are matters of opinion which this court may disagree with its earlier panel). (*Chan Yock Cher @ Chan Yock Kher vnChan Teong Peng* [2005] 4 CLJ 29).

(g) Where an applicant under rule 137 has not been heard by this court and yet through no fault of his, an order was inadvertently made as if he had been heard. (*Raja Prithwi Chand vnSukhraj Rai* [AIR] 1941).

(h) Where bias had been established (*Taylor & Anor. v. Lawrence & Anor.* [2002] 2 All ER 353).

(i) Where it is demonstrated that the integrity of its earlier decision had been critically undermined e.g. where the process had been corrupted and a wrong result might have been arrived at (*Re Uddin* [2005] 3 All ER 550).

(j) Where the Federal Court allows an appeal which should have been consequentially dismissed because it accepted the concurrent findings of the High Court and Court of Appeal (*Joceline Tan Poh Choo & Ors v V*

Muthusamy [2007] 6 MLJ 485).

[55] Other categories where an application for a review may be allowed include the ground of coram failure (See *Gurbachan Singh s/o Bagawan Singh & Anor v Vellasamy s/o Pennusamy & Ors and other applications* [2012] 2 MLJ 149; [2012] 2 CLJ 663) and procedural unfairness (see *Cassell & Co Ltd v Broome and another (No 2)* [1972] 2 All ER 849).

[56] Procedural unfairness was alluded to in *Dato' See Teow Chuan* wherein reference was made to the case of *Cassell & Co Ltd v Broome and another (No 2)* which dealt only with the question of the order on costs where the parties had not had a fair opportunity to address argument on that point. Hence, it is in that very limited scope that procedural unfairness may be relied upon in a similar review application as one under our r 137 of the RFC.

[57] With the background that this court as a court of law is vested with the inherent jurisdiction to prevent injustice arising from procedural unfairness or abuse of the court process, we will now proceed to examine the applicant's review application to determine whether this case is one where this court should exercise its inherent power to grant the orders sought for by the applicant.

Prime Minister's Office media statement

[58] On the first ground of complaint of the applicant that the judgment of the Federal Court dated 10 February 2015 ought to be reviewed because of the swift and premature release of the Prime Minister's Office ('PMO') statement of the court's judgment, we find there is no merit in this allegation by the applicant that falls within the ambit of r 137 of the RFC. There is no evidence to show that there was any communication whatsoever between PMO and the Federal Court either prior or subsequent to the decision of the case. The affidavit in reply of Datuk Seri Tengku Sariffuddin bin Tengku Ahmad, a Director of the Media Division at PMO confirmed this fact.

[59] It should be noted that the Federal Court in delivering its decision on 10 February 2015 had delivered full written grounds of judgment read out in open court giving the reasons and findings on the issues raised by the defence and the prosecution during the hearing of the appeal which it had reserved for a decision. There is nothing credible other than the mere assertion of the applicant that the said PMO's statement had given the impression to the public that the applicant as the accused person did not receive a fair and independent hearing when the hearing and arguments by parties before the court had already concluded a few months earlier.

[60] As to whether it was right or proper for the PMO to issue a statement commenting on the applicant's conviction immediately after the court's decision on 10 February 2015, we take the view that it is not within the control of the court to stop the issuance of such statement. As a separate branch of the government, the Judiciary and the courts operate independently in their decision making process with no interference from other branches of the government. There has to exist a clear separation of powers between the Judiciary and the other two arms of the government in order to uphold the rule of law.

Conduct of lead prosecutor

[61] On the second ground of complaint of the applicant that the conduct of counsel leading the prosecution after the date of this court's judgment rendered the said judgment objectively unsafe, we also find there is no merit in this allegation by the applicant that can be said to give a reason to invoke r 137. It was contended for the applicant that subsequent to the applicant's conviction, Tan Sri Muhammad Shafee Abdullah, the said leading counsel, had embarked upon a speaking roadshow to explain the 'Sodomy II Case' by which term this case was referred to by learned counsel. To the applicant this conduct of the prosecutor had tainted the fairness of the applicant's trial and further showed that the prosecutor was biased and conducted the prosecution not in the interest of justice.

[62] With respect we could not agree with the above contention of the applicant. We agree with the submission of learned senior federal counsel for the respondent that this issue is devoid of any merit and it is not within the limited circumstances for the court's inherent powers to be invoked. We are of the view the alleged misconduct if any of the lead prosecutor has no bearing on the outcome of the decision of the Federal Court in this case. We noted that there is no evidence furnished or averment of any sort made by the applicant to suggest that this alleged misconduct of the lead prosecutor had influenced the decision of the Federal Court on 10 February 2015.

[63] As to the contention of the applicant that the said lead prosecutor was biased and conducted the prosecution of the case not in the interest of justice we need to state here that the Attorney General had earlier appointed a third party to carry out the appeal process at the Court of Appeal and the Federal Court due to the fact that the Attorney General's Chambers of Malaysia was claimed by the applicant to be biased towards the government and practised selective prosecution in framing the charge against him. In doing so, Tan Sri Muhammad Shafee Abdullah was duly appointed under ss 376(3) and 379 of the Criminal Procedure Code ('the CPC') read together with art 145(3) of the Federal Constitution to conduct and lead the prosecution team at the hearing

of the appeals of the applicant's case at the Court of Appeal and Federal Court. The Federal Court in their decision found that Tan Sri Muhammad Shaffee Abdullah as the lead prosecutor was a fit and proper person under s 376(3) of the CPC as no evidence was tendered by the applicant to prove that there was such a conflict of interest as alleged by the applicant (see the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2016] 3 MLJ 277 at p 290; [2016] 4 AMR 213 at p 222).

Violation of rules of natural justice

[64] We shall now deal with the third ground of complaint of the applicant. Under this heading of complaint there are a number of issues raised by the applicant against the decision of the Federal Court dated 10 February 2015. We shall deal with only the main issues raised which we think merit our consideration as to whether the inherent powers of the court can be invoked to grant the orders sought for by the applicant.

[65] Essentially the arguments put forward by learned counsel for the applicant centred on the allegation of serious violation of the rules of natural justice which has occasioned a miscarriage of justice viewed from the conduct of the trial of the applicant and as seen from the grounds of judgment of both the High Court and the Court of Appeal. Learned counsel for the applicant submitted on this point that the Federal Court should have acted to correct this serious injustice which they did not do so and as a result the respondent has benefited from this departure of such an important rule which constituted an abuse of process.

[66] Before us learned counsel for the applicant submitted that the learned trial judge in the High Court had ruled as inadmissible evidence alluding to alleged previous occasions on which acts of sodomy had been committed by the applicant. In the police report lodged by the complainant (PW1) it was mentioned that there were previous acts of sodomy upon the complainant by the applicant before the date of the commission of the offence as stated in charge against the applicant. It was further submitted that when the learned trial judge came to write the judgment he acted on this very evidence.

[67] It is the contention of the applicant that as a matter of natural justice such previous evidence must not be used against him. The Federal Court as the apex court should have acted to correct this serious injustice. Similar facts evidence under ss 14 and 15 of the Evidence Act 1950 is not admissible unless a balancing act is applied and there must be cogent reasons for entertaining such evidence, but the Federal Court failed to act in the present case.

[68] On the above contention of the applicant, we take the view that this issue of misevaluation of the evidence, improper direction and non-direction of the trial judge, if any, are not within the permitted circumstances that this court could exercise its inherent powers of review. It is to be noted that notwithstanding this alleged injustice on the admission of inadmissible evidence relied on by the learned trial judge in his judgment, the applicant nevertheless was acquitted and discharged at the conclusion of the trial when the trial judge ruled that the prosecution had not proven its case beyond reasonable doubt and the defence has created a doubt on the prosecution case.

[69] Learned counsel for the applicant referred to us the Federal Court's judgment at para 51 of the judgment to show that the Federal Court appeared to have acted on this evidence and we reproduce in full para 51 of the judgment as follows:

> The minute details testified by PW1 gave his testimony the ring of truth, as, unless he had personally experienced the incident, he would not be able to relate the antecedent facts and the sexual act in such minute details. It must be borne in mind too that despite the lengthy cross-examination, PW1 had withstood that gruelling session which the trial judge described as 'sometimes bordering on harassment'. PW1 spoke of the previous encounters he had with the appellant, the unpleasant sensation of pain and the reason for bringing the KY Jelly. He hid nothing. The trial judge found PW1 to be completely open and honest. The Court of Appeal agreed with this finding.

[70] Based on the above observation made by the Federal Court on the evidence of the complainant PW1 we have to state here that we are not in a position to ascertain whether the Federal Court had in fact relied upon the alleged inadmissible evidence. We are also not in a position to ascertain whether the Federal Court had exercised the balancing act as submitted by learned counsel for the applicant in order for the prosecution to admit and apply the evidence under ss 14 and 15 of the Evidence Act 1950 against the applicant. We would also like to state on this issue now raised before us that we found that it was not raised before the Federal Court. It is for this reason that we think the Federal Court did not address this point at all and hence no reason was given on the issue of the admission or rejection of the alleged inadmissible evidence.

[71] Learned Counsel for the applicant also referred to us para 51 of the judgment of the Federal Court to show that the Federal Court had erroneously relied on the evidence that PW1 the complainant brought the lubricant KY Jelly whereas there was no evidence to this effect. It was contended for the applicant that this is evidence given from the Bar by the prosecution at the stage

of submission by the parties. The prosecution shall not be allowed to embellish this piece of evidence as the applicant cannot be convicted on the evidence which the witness did not give.

[72] On the above issue raised for the applicant that PW1 did not bring KY Jelly to the scene of the crime, we noted from the record of proceedings of the trial court that the issue of KY Jelly was in fact dealt with in the evidence by both the prosecution and the defence. On this issue of KY Jelly the Federal Court in its judgment held that there was no conclusive evidence that KY Jelly had in fact spilled on to the carpet (exh P49A). The Federal Court went on to state in its judgment that it took the view that the issues on KY Jelly and exh P49A were not critical piece of evidence to the prosecution's case in light of other compelling evidence. It is therefore our judgment that this issue on KY Jelly raised by the applicant is a non-issue and it had not caused injustice to the applicant.

[73] Learned counsel for the applicant also mounted an attack on the integrity of the scene of the alleged crime which he contended was a matter of primary importance and this was compromised by the prosecution. According to PW1 the alleged act of sodomy was committed on a carpet in apartment Unit 11–5–1. It was established that there was no carpet in that unit but yet the apex court regarded this as a point that was not material. Describing a point of vital importance as one of no consequence because of other compelling evidence to the applicant has had the effect of depriving the applicant of one of the most fundamental rules of criminal justice. That rule is that an accused person who raises a reasonable doubt as to the truth of the prosecution case is entitled to an acquittal.

[74] With respect we do not think at this stage of the applicant's review application that we should take a different stand from the findings that have been made by the Federal Court on the above issue of the integrity of the scene of the alleged crime which the applicant contended had been compromised by the prosecution. The Federal Court in its judgment had stated that the issue of how the carpet (exh 49A) had 'moved' from apartment Unit 11–5–1 to Unit 11–5–2 was not critical to the prosecution's case in light of other compelling evidence. We do not think that we should look into what that other compelling evidence is as found by the Federal Court. Again we take the view that the issues relating to the misevaluation of the evidence, improper direction or non-direction by the Federal Court if any are not within the permitted circumstances that this court could exercise its inherent powers of review.

[75] Learned counsel for the applicant also challenged on the issues of the chain of evidence in relation to the exhibits produced during the trial and the degradation of samples for the DNA analysis and the quality of the DNA

evidence. It was contended for the applicant that PW25 had cut open the sample bag (P27) to add his own markings to the sample inside and this was an act of tampering with the exhibit. It is the applicant's case that the Federal Court was wrong on this issue to have found that there was no break in the chain of evidence relating to the exhibit. To the applicant the integrity of the sample was compromised as the cutting of the sample by PW25 was not necessary.

[76] On the above contention of the applicant that there was a break in the chain of custody of the exhibit and the tampering of the exhibit, we found that both the Court of Appeal and the Federal Court had given due consideration to this issue. The Federal Court in its judgment had stated that they agreed with the Court of Appeal that the integrity of the sample was not compromised.

[77] The Federal Court in its judgment has stated that they accepted the reasons given by PW25 for cutting open the sample bag (P27) and adding his own markings to the sample inside. PW25 was merely adhering to departmental guidelines and IGSO which required him as an investigating officer to put proper marking and labelling to exhibits for the purpose of identifications in court. The Federal Court also referred to the evidence of the chemist PW5 who in her testimony confirmed that she did not detect any tampering of the seals of the exhibits marked 'B to B10.'

[78] We are of the view there is no merit on the applicant's contention that there was a serious injustice occasioned by the conduct of the trial relating to the chain of custody of the exhibits and the alleged tampering of the exhibits. The issues raised by the applicant relate to question of facts and findings made by the respective courts. There were reasons given by the courts for such findings. We therefore again find that the issues raised are not within the permitted circumstances that this court could exercise its inherent review powers as mentioned in r 137 of the RFC.

CONCLUSION

[79] For the abovestated reasons we find there is no merit in the application. This is not a fit and proper case for this court to exercise its inherent jurisdiction to make any order for the case to be reviewed. This application is therefore dismissed.

Application dismissed.

Reported by Ashok Kumar